United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6075

To be argued by
MICHAEL H. DOLINGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6075

B P/S

NATURAL RESOURCES DEFENSE COUNCIL, INC.; NEW YORK ASSOCIATION FOR BRAIN INJURED CHILDREN; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; ENVIRONMENTAL ACTION COALITION; FRIENDS OF THE EARTH; HIGHWAY ACTION COALITION; NATIONAL WELFARE RIGHTS ORGANIZATION,

Plaintiffs-Appellees,

—v.—

RUSSELL TRAIN, as Administrator of the Environmental Protection Agency; and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Preliminary Statement

This brief is submitted in reply to the brief of plaintiffs-appellees ("NRDC") and in further support of defendants-appellants' request for reversal of the District Court's decision.

Statement of Facts

In its brief, NRDC challenges the adequacy of the Environment Protection Agency's ("EPA's") efforts to regulate lead, apparently to suggest either that Congress

must have intended to deny the Administrator discretion under Section 108 or that, in the public interest, this Court should find such an intention. The facts reflecting EPA's performance in this regard are set forth in EPA's original brief and will not be repeated here. They do indicate—contrary to NRDC's assertions—that the Agency has faithfully served the anti-pollution purposes of the Clean Air Act by acting to eliminate airborne lead from both mobile and stationary sources; although the effectiveness of its principal tool—gasoline lead regulations under Section 211 of the Act—has been delayed as a result of litigation commenced by the petroleum industry, those cases have recently concluded with court approval of the Agency's regulations.

In any event the characterization of EPA's performance since 1970 is not relevant to the issue before this Court, which concerns only what Congress intended in 1970 by its enactment of Section 108 of the Clean Air Act. Moreover if the adequacy of EPA's performance were deemed to be relevant, the proper proceduce would be to remand to the District Court for further development of a record. *See, e.g., NRDC* v. *Train,* 519 F.2d 287 (D.C. Cir. 1975).

ARGUMENT

Section 108 Of The Clean Air Act Gives the Administrator Discretion to Decide Whether to List and Issue Criteria For Lead.

NRDC asserts that the Clean Air Act requires the Administrator of EPA to list all air pollutants—including lead—that meet the criteria of subparagraphs 108(a)(1)(A) and (B). To avoid the implications of subparagraph (C), which on its face imports discretion into the decision to list a substance under that section, NRDC invokes the

structure of the Act and its legislative history as definitive evidence that Section 108 means something other than what it appears to say.

In large measure this approach to the statute has been answered in EPA's original brief. Nonetheless, certain points made by NRDC require further response.

The Structure of the Act

NRDC asserts that EPA has confused means and ends by failing to recognize that sections 108-110 are central to the 1970 Act and that, by asserting his discretion not to invoke those provisions, the Administrator is evading the intent of Congress to eliminate air pollution as expeditiously as possible.

What NRDC seems to argue is that the setting of criteria and standards under Sections 108 and 109 is in some sense necessary to the performance of EPA's regulatory tasks under all provisions of the Act.* This is simply not the case, and the Act gives clear recognition to the fact that the "listing-criteria-standards" approach, with its reliance on state implementation plans, is not the exclusive route to regulation of air pollutants—even those pollutants that are hazardous to health and welfare and that came from numerous or diverse mobile or stationary sources. For example, Section 211 provides for regulation of lead content in gasoline. There is no question that lead from gasoline is harmful to public health or welfare and comes from numerous mobile sources, and yet regulations under Section 211 are in no way dependent upon the issuance of criteria and standards under sections 108

* NRDC asserts (Br. at 17):
"Without a primary ambient air quality standard for lead, the Administrator lacks the essential standard or objective for the design and implementation of emission limitations necessary to protect public health."

and 109. Indeed none of the Act's provisions for federal source controls require issuance of criteria and standards under Sections 108 and 109 as a prerequisite or accompaniment to the imposition of such controls, and two of those provisions—Sections 111(d) and 112—expressly state that they are to be invoked when no criteria have been issued for the pollutants that are to be regulated. Thus, Section 112 authorizes the Administrator to issue emission standards for stationary sources of hazardous air pollutants "to which no ambient air quality standard is applicable" and Section 111(d) requires the states to submit standards and implementation plans to regulate emissions from existing stationary sources of air pollutants "for which air quality criteria have not been issued or which [are] not included on a list published under Section 108(a) or 112(d)(i)(A) . . ."

Moreover, although NRDC argues at one point that the provisions of Sections 108 and 109, providing for criteria and standards, are separable from Section 110 (state implementation plans) and are thus applicable to all regulatory provisions of the Clean Air Act (Br. at 14), both the Act and the legislative reports clearly treat Sections 108, 109 and 110 as one method of regulation, separate and distinct from other means of regulation provided for in the federal source control sections of the Act. Thus, if the Administrator has discretion under the Act to choose among strategies, he is not required to employ Sections 108 and 109 when he chooses to impose direct source controls rather than require development of state implementation plans.*

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* At other points, NRDC seems to argue that even if the Administrator imposed direct federal source controls, he would still have to require state implementation plans under section 110. (Br. at 15). This would in fact be true if section 108 were mandatory, since the Act does require submission and approval of state plans for all pollutants listed under section 108. The result, then, would be that the states would have to go through

[Footnote continued on following page]

As for NRDC's warning about the dangers of "unfettered" discretion, this threat is in fact illusory. EPA does not contend that the administrator's decisions are immune from review; as EPA observed in its original brief (p. 22 n.*): "Discretion to choose among alternatives does not necessarily mean discretion not to act. . . ." Presumably the Administrator's decisions with respect to regulation of air pollutants would be subject to review under the Administrator Procedure Act, *see, e.g., NRDC* v. *Train*, 519 F.2d 287 (D.C.Cir. 1975), and in egregious cases under 28 U.S.C. § 1361. *See generally United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371, 374 (2d Cir. 1970).

In a further attempt to establish the mandatory nature of Section 108, NRDC asserts (Br. at 7-8) that pollution controls under the Act are divided into three categories —those for pollutants that are both harmful and widespread (Section 108); those that are harmful but not widespread (Section 112); and those that are neither harmful nor widespread (Section 111). According to NRDC, the strictest procedures are reserved for the first category, less strict procedures are applied to the second category and the third is essentially discretionary. The implication is that unless the Administrator is compelled to invoke section 108-110 controls, the Congressional intent to impose a mandatory deadline to eliminate the most serious pollution problems will be stymied.*

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a meaningless procedure if the federal source controls sufficed to achieve the air quality standards promulgated under section 109. Such redundancy and wasted effort argues against NRDC's assertion that the Administrator must invoke the procedures of sections 108-110.

* NRDC refers to a 1976 deadline for eliminating airborne lead pollution and argues that EPA's interpretation would result in not meeting that deadline and consequently must be wrong. (Br. at 17). This reasoning is in fact circular. The issue before this Court is whether Congress intended to require the use of Sections 108-110 of the Act to regulate lead by placing it on the initial list of pollutants to be issued in 1971. If EPA's view of the Act is correct, then there is no 1976 deadline for lead.

In fact, this characterization of the Act and NRDC's conclusions therefrom are incorrect. In the first place, the respective coverages of Sections 108, 112 and 111 do not correspond to NRDC's alleged order of seriousness. For example, Section 112 applies to "hazardous pollutants," which, as defined, is a stricter category than that of Section 108. Thus hazardous pollutants are those which "may cause, or contribute to, an increase in serious irreversible, or incapacitating reversible, illness . . . ." whereas Section 108 pollutants need only have "an adverse effect on public health or welfare. . . ." Furthermore, contrary to NRDC's suggestion and in spite of the very dangerous nature of the pollutants covered by Section 112, the Section 112 procedures are entirely discretionary. All that is required is that:

> "The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendment of 1970 publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant *for which he intends to establish an emission standard under this section.*" (Emphasis added.)

The section has no requirement that the Administrator must "intend" to regulate any particular hazardous pollutant.

In contrast, Section 111 *is* mandatory with respect to existing stationary sources in spite of the fact that the caegory of pollution sources it covers includes pollutants less dangerous than those covered by section 112 and probably Section 108.* See Sec. 111(d).

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* In fact Section 111 and Section 108 are not readily comparable because the former is worded in terms of pollution sources (since it provides for source regulation) whereas the latter is defined in terms of pullutants. Thus, while section 108 speaks of pollutants which have "an adverse effect on public health or welfare", Section 111 covers "categories of sources" which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."

Thus, NRDC's suggestion that the seriousness of the danger correlates with the strictness of the controls and, by implication, with the mandatory nature of the procedures, must be rejected. If direct control of "hazardous" pollutants is discretionary, there is no basis for assuming that pollutants of a less serious if more widespread nature are subject to more mandatory controls. Indeed, a comparison of the sections cited provides further evidence of the discretionary nature of section 108. The wording of Section 112(a)(2)—quoted above—is strikingly similar to that of subparagraph 108(a)(1)(C). If Section 112 is discretionary—as it is indisputably is—the parallel terminology of section 108 should also import discretion. Certainly if Congress had intended to avoid such a result, it would have used distinctly different language in the two provisions.

Finally, NRDC's neat scheme of pollutant controls under the Act is further undermined by its omission of the source control provisions for mobile sources—Sections 202 and 211. Since mobile sources account for over 90% of airborne lead, such an oversight is of considerable significance. Moreover, these provisions further belie NRDC's analysis. Section 202—covering motor vehicle emissions—is mandatory, whereas Section 211, dealing with fuels and fuel additives, is discretionary. Since fuel lead additives account for the overwhelming bulk of airborne lead, obviously the seriousness of the pollution problem to which a particular provision is addressed does not determine whether its provisions are mandatory.

The Language of Section 108

On its face subparagraph 108(a)(1)(C) provides that listing is required only if the Administrator of EPA

"plans to issue air quality criteria" under Section 108. The provision assumes that even if a pollutant meets the criteria of sub-paragraphs 108(a)(1)(A) and (B), the Administrator can decide not to list the pollutant.* NRDC's suggested interpretation—that subparagraph C applies only to those pollutants for which criteria "had been planned, and these plans . . . revealed to Congress" (Br. at 25)—strains credulity. In essence, NRDC claims that Congress required action solely on a previously defined list of pollutants but did not bother to specify the pollutants or even to identify the list. If Congress intended to require a certain type of regulation for a specified group of pollutants, it was perfectly capable of saying so; in other parts of the Act (specifically Section 202), when it wanted to require action on specific pollutants, it identified the pollutants. Furthermore, NRDC's interpretation would have the curious effect of requiring the listing of those pollutants mentioned to Congress by the Secretary of Health, Education and Welfare but not of any others that either he or the EPA Administrator may subsequently have determined meet the criteria of sub-paragraphs 108(a)(1)(A) and (B).

Finally, as already mentioned, virtually identical language was used by Congress in Section 112 to give the Administrator discretion to issue or not issue regulations for "hazardous" pollutants. (The only difference

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* In spite of NRDC's contrary suggestion (Br. at 23 n. 18), this view of the section is clearly supported in dicta by the Third Circuit in *St. Joe Minerals Corp.* v. *EPA*, 508 F.2d 743, 744 n. 3 (3d. Cir. 1975), *vac. on other gds.*, 96 S. Ct. 2196 (1976). Moreover, the Court in *Ethyl Corp.* v. *EPA*, 8 ERC 1785 (D.C. Cir. 1976), did not find—as NRDC claims—that section 108 is mandatory. *See id.* at 1792-93 n. 21.

is the use of the word "plans" in Section 108 for the word "intends" in Section 112.) The use of essentially the same wording in Section 108 strongly suggests the same intention to give the Administrator the discretion to decide whether to invoke its procedures.*

The Legislative History

Finally, NRDC points to certain expressions in the legislative history as reflecting an intention to deny the Administrator any discretion as to listing of pollutants meeting the criteria of subparagraphs A and B of Section 108. In fact, the legislative history on balance is ambiguous and cannot overcome the clear intendment of the statute, as seen in the language of Section 108 and the accompanying provisions of the Act.

Plaintiff suggests that underlying the 1970 amendments was a strong suspicion by Congress about the willingness of the federal environmental agency to do its job and that consequently it not only set time deadlines but specified the action that must be taken with respect to certain types of pollutants. There is no

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* In offering its interpretation of Section 108, NRDC also repeatedly emphasizes the use of the word "shall" in the introductory language—"The Administrator shall list . . ." This analysis is beside the point. Obviously the meaning of the section depends upon what follows the word "shall", and Section 108 explicitly conditions listing upon the Administrator's plan to issue criteria. The "shall" in Section 108(a)(1) is thus mandatory only in the sense that it mandates that if the Administrator plans to issue criteria for a pollutant which meets the tests of subparagraphs A and B, he must list the pollutant and then issue criteria for it. *Cf. Ethyl Corp.* v. *EPA*, 8 ERC 1785, 1792 n. 21 & 1796 n. 37 (D.C. Cir. 1976) (en banc) (recognizing Administrator has "measure of discretion" under section 108 in spite of word "shall").

question that Congress enacted the 1970 amendments because of its dissatisfaction with the pace of prior regulatory efforts, but this dissatisfaction did not take the form that NRDC suggests. As the Supreme Court has stated: "The Amendments reflect congressional dissatisfaction with the progress of existing air pollutant programs and a determination to 'tak[e] a stick to the States. . . .'" *Union Elec. Co.* v. *EPA*, 96 S. Ct. 2518, 2522 (1976), *quoting Train* v. *NRDC*, 421 U.S. 60, 64 (1975). In doing this, Congress expanded the powers of the Administrator and, specifically with respect to the use of air quality criteria, set time limits and transferred from the states to the Administrator the authority to establish air quality standards. Indeed, although the matter is not free from doubt, both the conference report and the remarks of Senator Muskie quoted by NRDC in support of its interpretation of Section 108 (NRDC Br. at 19) appear to say no more than that Section 108 imposes a deadline for the issuance of criteria for pollutants meeting the requirements of Section 108.

The only legislative references cited by NRDC that appear at first sight to support its position are two statements from the Senate Report quoted at pages 18 and 21 of NRDC's brief. In fact, however, the significance of these two statements is questionable. As pointed out in EPA's original brief (pp. 26-27), the description of Section 108 found at page 54 of the Senate Report is demonstrably inaccurate and hence should not be given credence. As for the Second statement, from page 9 of the Senate Report, when read in context it too may be viewed as merely reflecting (a) the requirement that criteria be issued within the specified time period and (b) the committee's knowledge that the Secretary of Health, Educa-

tion and Welfare expected to issue criteria for those pollutants mentioned in the committee report.*

In any event, the legislative history—while clearly demonstrating that Congress was anxious to speed up the war on air pollution—falls far short of demonstrating, as NRDC contends, that Congress also intended to deny the EPA Administrator the discretion prevously entrusted to the Secretary of Health, Education and Welfare, to decide whether to issue criteria for particular pollutants. Given the broad range of overlapping regulatory alternatives made available to the Administrator under the 1970 amendments, and the clearly discretionary wording of Section 108, this ambiguous legislative

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* The passage in question reads in full as follows:

"Section 109: Air Quality Criteria and Control Technique.

This proposed legislation would require acceleration of the issuance of air quality criteria and information on control techniques as an integral part of the system for adoption of ambient air quality standards and implementation plans.

Pollution agents which would be subject to the provisions of this section would be those which are emitted from widely distributed air pollution sources and generally present in the ambient air in all areas of the Nation.

Air quality criteria for five pollution agent have already been issued (sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants). Other contaminants of broad national impact include fluorides, nitrogen oxides, polynuclear organic matter, lead, and odors. Others may be added to this group as knowledge increases. The bill would require that air quality criteria for these and other pollutants be issued within 13 months from enactment. If the Secretary subsequently should find that there are other pollution agents for which the ambient air quality standards procedure is *appropriate*, he *could* list those agents in the Federal Register, and repeat the criteria process." (Emphasis added.)

history cannot justify NRDC's assertion that the Administrator is compelled to use the listing procedures of Section 108 when he concludes that direct source controls are the most appropriate form of regulation.

Finally, with respect to the pending bill HR 10498, which reflects Congress's recognition that the Administrator has discretion to choose among alternative regulatory approaches, NRDC's citation of a passage in the House Report (Br. at 34) is beside the point. All that the quoted caveat says is that enactment of the bill will not effect the pre-existing substantive law concerning the authority or obligation of the Administrator to issue criteria for pollutants not covered by the new legislation. EPA does not argue that this bill, if enacted, would change the law relating to lead and thereby alter the outcome of this litigation. But the fact that the pending bill explicitly permits the Administrator to choose among strategies made available to him by the 1970 amendment, even while establishing a one-year deadline for action, is certainly strong evidence that Congress recognizses the Administrator's discretion under the Clean Air Act to choose a remedy other than listing pursuant to Section 108(a)(1).*

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* The bill reads, in pertinent part:

LISTING OF CERTAIN UNREGULATED POLLUTANTS

Sec. 120. (a) In the case of vinyl chloride, cadmium, arsenic, and polycyclic organic matter, unless the Administrator finds, after notice and opportunity for public hearing that the substance will not cause or contribute to air pollution which may reasonably be anticipated to endanger public health, he shall (not later than one year after the date of the enactment of the Clean Air Act Amendments of 1976) include such substance in the list published under section 108(a)(1) or 110(b)(1)(A) (in the case of a substance which, in the judgment of the Administrator,

[Footnote continued on following page]

As the Supreme Court recently noted, it has "previously accorded great deference to the Administrator's construction of the Clean Air Act." *Union Elec. Co.* v. *EPA*, *supra*, 96 S. Ct. at 2525. In this case, even without the benefit of such deference, a careful analysis of the Act compels the conclusion that the Administrator may regulate lead by direct federal controls instead of through the procedures of Sections 108, 109 and 110.

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causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness), or shall include each category of stationary sources emitting such substance in significant amounts in the list published under section 111 (b)(1)(A), or take any combination of such actions.

(b) Nothing in subsection (a) shall be construed to affect the authority of the Administrator to revise any list referred to in subsection (a) with respect to any substance (whether or not enumerated in subsection (a)).

CONCLUSION

For the reasons expressed in appellants' original brief and in this reply brief, it is respectfully requested that this Court reverse the decision of the District Court and direct that judgment be entered in favor of defendants.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

MICHAEL H. DOLINGER being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 30th day of August, 1976 he served a copy of the within Appellant's Reply Brief

by placing the same in a properly postpaid franked envelope addressed:

DAVID SCHOENBROD, ESQ., 15 W. 44th St., NYC 10036

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Michael H. Dolinger

Sworn to before me this

30th day of August, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2202[illegible]
Queens County
Term Expires March 30, 1977

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 27th day of August, 1976 she served ~~a~~ two ~~page proofs~~ copys of/the within Appellant's Reply Brief

by placing the same in a properly postpaid franked envelope addressed:

David Schoenbrod, Esquire
15 West 44th Street
New York, New York 10036

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

27th day of August, 1976

Ralph I. Lee

RALPH I. LEE
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Term Expires March 30, 1977